

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMES R. POLETTE,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security

Defendant.

Case No. 3:12-cv-06002-BHS-KLS

ORDER DENYING PLAINTIFF'S
MOTION/DECLARATION FOR STAY OF
PROCEEDINGS AND OTHER RELIEF

This matter comes before the Court on plaintiff's filing of a motion/declaration for stay of proceedings and other relief. See ECF #12. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing plaintiff's motion, defendant's response thereto and the remaining record, the Court hereby finds that for the reasons set forth below plaintiff's motion should be denied.¹

FACTUAL AND PROCEDURAL HISTORY

On September 13, 2009, plaintiff filed an application for disability insurance benefits, which was denied on initial administrative review thereof on October 5, 2009. See ECF #7, Administrative Record ("AR") 19, 62, 64-66, 111-12. On December 1, 2009, plaintiff requested

¹ Although plaintiff requests oral argument in regard to his motion, the Court finds such argument to be unnecessary.

1 that the initial denial of his application be reconsidered. See AR 69. That application again was
2 denied on reconsideration on February 11, 2010. See AR 19, 63, 70-74. Plaintiff filed a request
3 for a hearing by an Administrative Law Judge (“ALJ”), and such a hearing was held on March
4 17, 2011. See AR 19, 32-61, 75-76.

5 In a decision dated March 22, 2011, the ALJ determined plaintiff to be not disabled. See
6 AR 19-28. Plaintiff filed a request for review of the ALJ’s decision by the Appeals Council on
7 April 11, 2011. See AR 15. Plaintiff also filed a request for more time before the Appeals
8 Council acted on his request, which was granted by on July 27, 2012. See AR 7-8. On
9 September 18, 2011, however, the Appeals Council denied plaintiff’s request for review, making
10 the ALJ’s decision the final decision of the Commissioner of Social Security (the
11 “Commissioner”). See AR 1-5; 20 C.F.R. § 404.981.

12 On November 21, 2012, plaintiff filed a complaint in this Court seeking judicial review
13 of the Commissioner’s final decision. See ECF #1. The administrative record was filed with the
14 Court on May 20, 2013. See ECF #7. On May 20, 2013, the Court issued its scheduling order,
15 directing plaintiff to file his opening brief by June 17, 2013. See ECF #9. On June 19, 2013, the
16 Court granted plaintiff’s motion for an extension of time to file his opening brief, directing that it
17 be filed by July 17, 2013. See ECF #11. Plaintiff’s motion/declaration for stay of proceedings
18 and other relief was filed on July 17, 2013. See ECF #12. That motion is now ready for review
19 and a decision by the Court.

20 DISCUSSION

21 Plaintiff requests that this matter be stayed to allow him to petition the Commissioner to
22 re-open its final decision pursuant to 20 C.F.R. § 404.988 to address the constitutional issues he
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1 raises in his motion for stay of proceedings.² Specifically, plaintiff alleges his “due process
2 rights were violated by irregularities in the initial disability determination” committed by the
3 state agency responsible for conducting the initial administrative review of his application. ECF
4 #12, p. 1. This allegation is based on a review of the administrative record conducted by
5 plaintiff’s attorney subsequent to the administrative proceedings noted above. See id., pp. 2-3.

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7 That review, plaintiff asserts, shows the state agency had at most two hours in which to
8 review some 24 pages of medical records from his health care provider. See ECF #12, pp. 3-4;
9 AR 64, 190-213. Plaintiff further asserts this shows the state agency did not thoroughly review
10 those records. ECF #12, pp. 3-4. He asserts as well that while the state agency was required to
11 use a medical consultant to conduct its initial administrative review of his application, it did not
12 do so here, but rather waited another four months before using one in denying that application on
13 reconsideration. See ECF #12, p. 5. Based on these assertions, plaintiff argues:

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15 . . . that by 1) initially denying his disability claim based on a cursory look (at
16 best) at his medical evidence by a person unqualified to evaluate such record
17 and 2) then relying upon this unfair process as a basis for the ALJ’s
18 unfavorable decision, [he was deprived] of his due process right to a
19 meaningful evaluation of his condition and therefore of his claim. More
20 particularly, shoddy or dishonest initial determinations . . . inevitably resonate
21 through the proceedings to the ALJs, who must address the opinions of State
22 agency medical and psychological consultants and explain the weight given to
23 their opinions in an ALJ decision. . . .

24 ECF #12, pp. 5-6. The Court finds these arguments to be wholly without merit.

25 ² Relying on the Supreme Court’s decision in Weinberger v. Salfi, 422 U.S. 749 (1975), plaintiff appears to base his
26 motion in part on the assertion that the Court does not have the authority to consider his constitutional claim until he
has exhausted his administrative remedies with respect thereto. See ECF #12, p. 6. But as pointed out by defendant,
the reliance plaintiff places on that decision is misplaced. See ECF #13, pp. 7-8. Contrary to plaintiff’s assertion of
lack of subject-matter jurisdiction, the Supreme Court has long “adhered to the well-established principle that when
constitutional questions are in issue, the availability of judicial review is presumed.” Califano v. Sanders, 430 U.S.
99, 109 (1977). Indeed, such questions are far more appropriately addressed through the judicial process than they
are via agency proceedings. See id. (“Constitutional questions obviously are unsuited to resolution in administrative
hearing procedures and, therefore, access to the courts is essential to the decision of such questions.”).

1 First, plaintiff has failed to show that a re-opening of the Commissioner's final decision
2 would be available under 20 C.F.R. § 404.988. That regulation lists several conditions pursuant
3 to which a re-opening may occur, none of which appear to be applicable here. See id. The only
4 possible one would be for "good cause" as that term is defined in 20 C.F.R. § 404.989. 20 C.F.R.
5 § 404.988(b). "Good cause" exists where:

6 (1) New and material evidence is furnished;

7 (2) A clerical error in the computation or recomputation of benefits was made;
8 or

9 (3) The evidence that was considered in making the determination or decision
10 clearly shows on its face that an error was made.

11 20 C.F.R. § 404.989(a). Of these only 20 C.F.R. § 404.989(a)(1) would seem to be applicable,
12 but the documentation of the state agency's initial review of plaintiff's application clearly was
13 available – and thus made known – to plaintiff well before the issuance of the Commissioner's
14 final decision in this matter, as shown by the notice thereof contained in the administrative
15 record. See AR 64-66.

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17 Second, plaintiff has not shown that even if he is correct that the state agency spent only
18 two hours reviewing the submitted medical records, that that amount of time was insufficient to
19 allow for a proper initial administrative determination in this matter. As defendant notes, there is
20 nothing in those records to indicate that a proper review thereof could not have been done within
21 that time frame. See AR 190-213. Nor has plaintiff made any showing that had the state agency
22 spent more time reviewing the medical records in question at the initial stage of review, that any
23 different result would have occurred.

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25 Third, while plaintiff relies on 20 C.F.R. § 404.1615(c)(1) – which states that "[d]isability
26 determinations will be made by . . . [a] State agency medical or psychological consultant and a

State agency disability examiner” – to argue the state agency erred by not doing so in this case at the initial stage of administrative review, as pointed out by defendant:

Plaintiff’s [disability] claim was reviewed by a Single Decision Maker [Model (SDM)] at the initial stage ([AR] 62, 64-66, 153-155, 214-221). The Single Decision Maker model was created by the [Social Security Administration (“SSA”)] in order to “improve the disability determination process,” and the [SSA] uses the model in ten test states, including Washington state. [Program Operations Manual System] POMS DI 120015.100(C), [<https://secure.ssa.gov/apps10/poms.nsf/lnx/0412015100>]. The Single Decision Maker model of disability adjudication was conducted in accordance [with] 20 C.F.R. § 404.906(b)(2). . . .

ECF #13, p. 4. Under the SDM, “Disability Examiners with SDM authority complete all disability determination forms and make initial disability determinations in many cases without medical or psychological consultant (MC or PC) signoff.” POMS DI 120015.100(B)(1), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0412015100>; see also 20 C.F.R. § 404.906(b)(2).³ Plaintiff, as further pointed out by defendant, has not shown the state agency failed to comply with the requirements of POMS DI 120015.100 or 20 C.F.R. § 404.906(b)(2) in this case.⁴ In addition, as noted above, a medical consultant did subsequently review the record in also denying plaintiff’s application on reconsideration thereof (see AR 70-74, 214-21, 355), and plaintiff again has made no showing that the fact that such review occurred some four months later unfairly prejudiced his claim or was otherwise improper under the Commissioner’s regulations.

³ That regulatory provision states in relevant part:

In the single decisionmaker model, the decisionmaker will make the disability determination and may also determine whether the other conditions for entitlement to benefits based on disability are met. The decisionmaker will make the disability determination after any appropriate consultation with a medical or psychological consultant. The medical or psychological consultant will not be required to sign the disability determination forms we use to have the State agency certify the determination of disability to us (see § 404.1615). . . .

Id.

⁴ Indeed, at least on the face of the initial administrative determination notice there is no indication in the record that proper procedures were not followed here. See AR 64-66.

1 Fourth, plaintiff has not shown that any error that did occur at the initial review stage in
2 fact tainted the subsequent review of the evidence in the administrative record conducted by the
3 ALJ. Plaintiff's assertion that "shoddy or dishonest initial determinations by [the state agency]
4 inevitably resonate through the proceedings to the ALJs" (ECF #12, pp. 5-6), has no support in
5 the record and therefore is insufficient to show error – let alone error of constitutional magnitude
6 – occurred in this case. Nor is there any indication that the ALJ was improperly influenced by
7 what occurred previously during the administrative review process, and plaintiff has not made
8 any serious attempt to show otherwise.
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10 Fifth, plaintiff already has received all process that was due him. "It is axiomatic that due
11 process requires that a claimant receive meaningful notice and an opportunity to be heard before
12 his [or her] claim for disability benefits may be denied." Udd v. Massanari, 245 F.3d 1096, 1099
13 (9th Cir. 2001) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)); see also Ludwig v.
14 Astrue, 681 F.3d 1047, 1053 (9th Cir. 2012) ("Notice and [a meaningful] opportunity to be heard
15 are the hallmarks of procedural due process.") (citation omitted). Claimants are provided several
16 opportunities for having their applications for disability benefits be reviewed, including as noted
17 above determinations made at the initial and reconsideration levels of administrative review and
18 after a hearing before an ALJ, as well as judicial review following appeal to federal court. See 20
20 C.F.R. § 404.900(a). As noted above, plaintiff has taken full advantage of all of these levels of
21 review. He has not shown that he has been denied any level of administrative or judicial review
22 to which he is entitled or would be entitled on re-opening of his claim.
23

24 Sixth and last, even if error did occur at the initial administrative review level implicating
25 his due process rights, plaintiff has not shown any prejudice warranting remand. In addition to
26 the requirement that a due process violation actually be shown – which has not been done for the

1 reasons discussed above – prejudice as a result of that violation also must be demonstrated. See
2 Ludwig, 681 F.3d at 1053-54 (citing Shinseki v. Sanders, 556 U.S. 396, 407 (2009)). A finding
3 of prejudice “requires ‘case-specific application of judgment, based upon examination of the
4 record.’” Id. at 1054 (quoting Sanders, 556 U.S. at 407). The “burden is on the party claiming
5 error to demonstrate” prejudice, however, as it is to establish the alleged constitutional error in
6 the first place. Id. In addition, that party must “show at least a ‘substantial likelihood of
7 prejudice.’” Id. (citation omitted).

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9 “Among the case-specific factors” the Court “must consider are ‘an estimation of the
10 likelihood that the result would have been different,’ as well as the impact of the error on the
11 public perception of such proceedings.” Id. (quoting Sanders, 556 U.S. at 411) (internal footnote
12 omitted). As discussed above, plaintiff has already received all process that was due him and has
13 failed to show the result would be any different if remand were allowed as requested. Plaintiff,
14 furthermore, has not shown the existence of any error on the part of the state reviewing agency,
15 or the Commissioner for that matter, in reviewing his application, let alone demonstrated that any
16 possible error that did occur has had or would have an adverse impact on the public’s perception
17 of the administrative review process in the Social Security context. A substantial likelihood of
18 prejudice, therefore, has not been shown here.

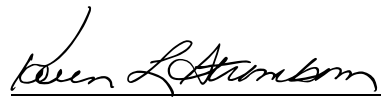
19 20 CONCLUSION

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22 For the reasons set forth above, plaintiff has failed to show his due process rights have
23 been violated or that remand for the purpose of seeking a re-opening of the Commissioner’s final
24 decision is otherwise warranted at this time. Accordingly, plaintiff’s motion/declaration for stay
25 of proceedings and other relief (see ECF #12) hereby is DENIED. Plaintiff, therefore, is directed
26 to file his opening brief by **no later than September 27, 2013**. Defendant shall file her

1 responsive brief by **no later than October 25, 2013**. Plaintiff shall file his reply brief, if any, by
2 **no later than November 8, 2013**.

3 The Clerk is directed to send a copy of this order to counsel for plaintiff and counsel for
4 defendants.

5 DATED this 30th day of August, 2013.
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10 Karen L. Strombom
11 United States Magistrate Judge
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